IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 332.

WASHINGTON PUBLIC SERVICE COMMISSION, PUBLIC UTILITIES COMMISSIONER OF OREGON, ET AL., *Appellants.*

vs.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, ET AL.

No. 333.

UNION PACIFIC RAILROAD COMPANY, CHICAGO AND NORTH WESTERN RAILWAY COMPANY, ET AL., *Appellants,*

vs.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, ET AL.

No. 334.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants,*

vs.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO.

CONSOLIDATED REPLY BRIEF

OF

THE NATIONAL LIVE STOCK PRODUCERS ASSOCIATION,
AMERICAN NATIONAL CATTLEMEN'S ASSOCIATION,
COLORADO CATTLEMEN'S ASSOCIATION,
IDAHO WOOL GROWERS ASSOCIATION,
UTAH CATTLE AND HORSE GROWERS ASSOCIATION,
Intervening Appellees.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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Intervening Appellees.

STATEMENT.

The intervening appellees (hereinafter called the live stock associations) are voluntary organizations of live stock producers more particularly described as follows:

The National Live Stock Producers Association, is a cooperative organization composed of over 500,000 live stock growers and feeders throughout the live stock producing areas of the country, and twenty-two cooperative live stock associations, with its principal offices at 139 North Clark Street, Chicago 2, Illinois.

The American National Cattlemen's Association, is a voluntary non-profit organization of live stock producers with principal membership in the seventeen States west of the Missouri River, also in the States of Florida, Louisiana, Oklahoma and elsewhere, with executive office and postoffice address 515 Cooper Building, Denver, Colorado.

The Colorado Cattlemen's Association, is a non-profit associafion organized under the laws of the State of Colorado, with offices at 4651 Lafayette Street, Denver, Colorado; it is composed of 48 local associations throughout the State of Colorado, comprising approximately 5,000 members, many of whom have cattle ranching operations contiguous to The Denver and Rio Grande Western Railroad.

The Idaho Wool Growers Association, is a voluntary non-profit organization in the State of Idaho, with executive office and postoffice address 17 Broadbent Building, P. O. Box 2598, Boise, Idaho.

The Utah Cattle & Horse Growers Association, is a voluntary, non-profit organization composed of twenty local associations and numerous individuals totaling approximately 2,000 members in the State of Utah with executive office and postoffice address at Heber, Utah.

These live stock associations have an important and pecuniary interest in the issues involved in the above entitled proceeding and they and their members are engaged in the production, buying, selling and shipping of live stock within, to, and from the area involved in this proceeding and that they pay and bear the charges for the transportation of such live stock.

The live stock associations intervened in support of the complaint filed by the Denver and Rio Grande Western Railroad Company (hereinafter called the Rio Grande) before the Interstate Commerce Commission reported in *Denver and Rio Grande Western R. R.* v. *Union Pacific R. R.*, 287 I. C. C. 611 (Consol. R., II, 1518-1594).

The proceeding was brought because of the failure and refusal of the Union Pacific Railroad Company (hereinafter called the Union Pacific) to establish just, reasonable and non-discriminatory competitive joint through rates and charges in connection with the Rio Grande via its Colorado and Utah gateways in violation of Section 1 (4), Section 3, and Section 15 (1), (3), and (4) of the Act as amended:

(1) between (a) points on or via the Union Pacific in Utah north of Ogden, Idaho, Montana, Oregon, Washington, and British Columbia, Canada, and (b) Colorado common points and points east thereof; and

(2) between Utah common points and same northwest territory specified in (1) (a) above.

The live stock associations actively participated in the proceedings before the Interstate Commerce Commission, including the presentation of witnesses, filing of briefs, and participation in the oral argument before the entire Commission.

The Commission's decision granted only partial relief to live stock producers and feeders from the unreasonable

and unduly discriminatory rates complained of. Accordingly the Commission's order* provided in part that the defendants and the complainant according as they participate in the transportation, be, * * * required to establish * * * and thereafter maintain through routes via Ogden and Salt Lake City, Utah, in connection with the line of the complainant for the interstate transportation of various named commodities, in carloads, including ordinary live stock, from origins in the territory north and west of Ogden to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, Nebr., thence immediately north of points on the lines of the Union Pacific Railroad Company and the Chicago and North Western Railway Company from Omaha to Chicago, Ill., including destinations in the lower peninsula of Michigan and in Oklahoma and Texas; and to apply on such traffic, over such through routes, joint rates the same as those maintained and applied on like traffic from and to the same points over routes embracing the lines of the Union Pacific Railroad Company through Wyoming.

Thus the majority decision of the Commission denied relief to and from the important live stock market at Denver and the other Colorado common points and including the eastern part of Colorado, all of the States of Kansas, Nebraska, South Dakota, North Dakota, Minnesota, Wisconsin, northern part of Iowa and Illinois, and the upper peninsula of Michigan.

Subsequently the live stock associations again intervened in support of an action by the Rio Grande before the United States District Court for the District of Colorado

* (Appendix A, p. 119, Consolidated opening brief of the Denver and Rio Grande Western R. R. Co.)

(hereinafter called the Colorado Court), seeking to enjoin, annul and set aside in part the order of the Commission above referred to, filed a brief and participated in the oral argument in that proceeding.

The live stock associations contended that the order of the Commission herein referred to is unlawful, arbitrary, capricious and contrary to the evidence of record and the provisions of the Interstate Commerce Act to the extent in that it failed and to prescribe in the public interest the same relief to the restricted territory above described that it accorded to the territory to which relief was granted.

In the *Denver & Rio Grande Western Railroad Company* v. *United States*, 131 F. Supp. 372, the Colorado Court held that the Interstate Commerce Commission erred:

1. In failing to hold, under the undisputed evidence that through routes are in existence as a matter of law over the Rio Grande via the Ogden gateway in connection with the Union Pacific Railroad Company (hereinafter called the Union Pacific), and

2. In narrowly limiting itself to a consideration of the case under the restrictions of Section 15(4) of the Interstate Commerce Act, since that section does not apply

(a) where through routes are in existence, or

(b) where under the evidence of the case, and as a matter of law, relief should be granted under Sections 1(4), 3(4), 15(1) or 15(3) of the Act.

The live stock associations regard the action of the Colorado Court just and proper in remanding the entire cause for further proceedings in conformity with its opinion and judgment, because they believe that it will afford further relief, particularly to the important live stock territory to which relief was denied.

Appeals were taken to the decision of the Colorado Court by the Union Pacific in No. 333, the Washington Public Service Commission and certain other state commissions in

No. 332, and the Interstate Commerce Commission and the Secretary of Agriculture in No. 334. These appellants generally seek reversal of the judgment of the Colorado Court, except that the Secretary of Agriculture is not a party to the appeal from the Colorado Court. (Footnote 1, page 2, of the Government Brief.)

Appellants in Nos. 332, 333 and 334 urge that the decision of the Colorado Court be reversed mainly on the ground that the Court erred; as a matter of law, in holding contrary to the opinion of the Commission, that through routes exist via the Ogden gateway and the Rio Grande between the points in controversy on the Union Pacific and other railroads involved; and in its conclusion that the Commission's failure to so find was in error and so prejudiced its disposition of the entire proceeding.

Since the brief of the Washington Public Service Commission, *et al.*, is in support of and follows closely the arguments and authorities set forth in the brief of the Union Pacific, we believe that they do not require separate answers.

ARGUMENT.

PROCEDURAL QUESTIONS AGAIN REPEATED BY THE UNION PACIFIC.

In order to avoid unnecessary repetition, the intervening live stock associations adopt as their own, so far as their interests are concerned, the statements contained in the consolidated opening brief by the Rio Grande, filed pursuant to an order for consolidation of this Court on October 24, 1955, and also adopt that part of the Rio Grande's reply brief relating to procedural questions again raised by the Union Pacific, viz.:

1. That the Colorado Court had no jurisdiction to set aside the order of the Commission.

2. That the Rio Grande had no standing to bring suit to set aside the order of the Commission.

However, we submit a few supplementary comments in connection with the above points in the order shown above.

The Colorado District Court Had Jurisdiction to Set Aside the Order of the Commission.

The decision of the Commission corrected only in part the rate adjustment complained of by the live stock producers and other shippers.

The Colorado Court annulled and set aside the order of the Commission insofar as it denied full relief to complainant.

The undisputed facts shown in the record in this proceeding that through routes exist justify complete relief from discriminatory rates as was held by this Court in *Mitchell* v. *Chicago R. I. & P. Ry. Co.*, 246 I. C. C. 149, and *Henderson* v. *United States*, 339 U. S. 816, on the ground that the Act contemplates that there should be no excluded territory with respect to any commodity or persons.

The live stock producers and other shippers are entitled to just, reasonable and non-discriminatory joint through rates between points on the Union Pacific via the Rio Grande and points on all other railroads to the extent that need therefor is shown by the evidence of record in these proceedings.

This is in accord with the inherent purpose and policy of the Interstate Commerce Act as stated by the Commission in one of the early cases, *Missouri and Illinois Coal Co.* v. *Illinois Central Railroad*, 22 I. C. C. 339 (1911), where in giving special consideration to the Section 1(4) and Section 3(4) of the Act the Commission said:

> "Reading these provisions together, there can be no doubt as to the intent of Congress. Our railroads are called upon to so unite themselves that they will constitute one national system; they must establish through

routes, keep these routes open and in operation, furnish the necessary facilities for transportation, make reasonable and proper rules of practice as between themselves and the shippers, and as between each other."

Congress confirmed the Commission's view of the inherent purpose and policy of the Interstate Commerce Act in its statutory declaration of transportation policy as now set forth in the preamble to the Interstate Commerce Act (United States Code, Title 49).

As to the relief denied, the Colorado Court held that the Commission erred in denying and withholding relief by mistakingly regarding the provisions of Section 1(4), 3(4), 15(1) and 15(3) of the Interstate Commerce Act, subject to the restrictions of Section 15(4), that under the unpredicted evidence as to the existence of through routes, is not applicable to the proper disposition of the matters complained of. This is clearly an error of law, and by so doing it failed to properly apply the full force of the sections above referred to, to the issues in this proceeding. The grounds on which the Commission's decision are subject to review by the Courts are pointedly summarized in *ICC v. Union Pac. Railroad Co.*, 222 U. S. 241, where at page 548 this Court stated:

"It has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power."

Further in *Southern Pacific Company, et al. v. Interstate Commerce Commission*, 219 U. S. 433, the court held that the Commission's order may be set aside if it has acted unreasonably; in *United States of America and Interstate Commerce Commission v. Abilene & Southern Railway Company, et al.*, 265 U. S. 274, it held to the same effect where the Commission disregards or misinterprets important testimony or bases its order upon improper or insufficient evidence. Also, in the cases of *Interstate Commerce Commission v. L. & N. Railroad Company*, 227 U. S. 88, and *Florida East Coast Railway v. United States*, 234 U. S. 167, the court laid down the very important principle that a finding without evidence is beyond the power of the Commission and that the order of the Commission must conform to the record in the case.

The Rio Grande Had Standing to Bring Suit to Set Aside the Order of the Commission.

Pursuant to provisions of Section 13 of the Interstate Commerce Act, the Rio Grande, as a common carrier by railroad, was authorized to file a complaint before the I. C. C. the same as any other party likewise authorized to do so. The applicable provisions of Section 13 of the Act states that: "* * * any common carrier complaining of anything done, or omitted to be done by any common carrier, subject to the provisions of this part, in contravention of the provisions thereof, may apply to the Commission by petition * * *."

Since the Rio Grande had a right to bring a complaint the same as any other party it logically has the right to bring suit to set aside an order of the Commission the same as any other party has a right to do. In view of this, contentions by the Union Pacific to the contrary are wholly unjustified and untenable.

SUBSTANTIVE ISSUES IN COLORADO CASE

In view of the comprehensive treatment given by the Rio Grande in its reply brief to comments made of the Union Pacific and the intervening state commissions on their side, our reply will be directed to certain specific issues or statements of particular concern to the interests of live stock producers.

Union Pacific Contentions of Impoverishment Are Fantastic Speculations.

At page 3, and at pages 11, 13 and 35 the Union Pacific claims that in the event the Rio Grande prevails in obtaining reductions in the rates complained of that it, the Union Pacific, would suffer heavy financial loss and become impoverished.

We doubt that the Union Pacific would lose any appreciable live-stock traffic to the Rio Grande as a result of the establishment of joint through rates via the Ogden gateway. The Union Pacific provides a very good service for the transportation of live stock and the mere establishment of a parity of joint through rates as here sought would not result in a divergence of traffic for that reason alone. What additional live stock would be moved by the Rio Grande would depend almost wholly on the needs of the shippers along the Rio Grande mainly in connection with feeding in transit services that live stock shippers along the Rio Grande cannot avail themselves of under the existing rates.

The establishment of a parity of joint through rates would stimulate competition in the service on the part of both lines. This obviously would redound to the benefits of the live stock shippers via both rail carriers.

In any event, the needs of the live stock shippers are en-

titled to primary consideration. The claims of the Union Pacific about impoverishment are nothing short of fantastic speculations designed to obscure the basic issues of the case.

Live Stock Producers and Other Shippers Actively Interested in Obtaining Relief Sought.

At page 12 of its brief the Union Pacific states that no complaint has ever been filed by shippers or the public or by any state public service commission demanding the longer through routes and joint rates via the Rio Grande.

The very nature and extent of the problem, its broad scope and the many interests affected affords the best answer to that contention.

The Rio Grande, as a common carrier by railroad, was the logical party to initiate the matter by filing a complaint before the Interstate Commerce Commission. It was the only single party that could bring a complaint broad enough to enable various commodity interests to intervene without involving the hazard of unduly broadening the issues. The Rio Grande had the right to bring the complaint as a matter of law.

A total of forty-two separate interests intervened in support of or testified on behalf of the complaint by the Rio Grande (pages 25 and 27, Consolidated Opening Brief of Rio Grande) including the United States Department of Agriculture, the Public Service Commission of Utah, and the five live stock associations, intervening appellees herein.

This clearly shows that the Rio Grande is only one of a large number of interested parties, that intervened in support of its complaint. Many of the supporting interveners represent large numbers of vitally interested members, located in the various areas throughout the country, who would receive the primary benefits from the relief sought

in the complaint and any benefit or pecuniary gain to the Rio Grande would be mainly incidental.

A summary of the testimony of live stock witnesses clearly shows that relief from the excessive unreasonable and discriminatory rates complained of is necessary between all points in all the important regions of the country involved in these proceedings.

Mr. I. H. Jacob of Salt Lake City, General Manager of the Producers Live Stock Marketing Association, and Manager of the Wasatch Live Stock Loan Company, who has held his present positions for over fifteen years and has had long and extensive experience in raising and marketing live stock prior to that time, stated that the marketing association of which he is Manager is composed of live stock producers, that it operates branches at Ogden and North Salt Lake, Utah, Los Angeles, Calif., Denver, Colo., and Billings, Mont.; that these organizations are members of the National Live Stock Producers Association (intervenor in support of complainant in this proceeding) which handled an equivalent of 30,000 carloads of all species of edible live stock in 1948, and that of this number about 15,000 carloads moved by rail; that in the marketing activities his organization handled shipments on consignment at the markets; rendered a sales service off the markets, at ranches and pastures and other country points, and also bought stocker and feeder animals on order; that live stock was raised, grazed and fed along the lines of the UP and the D&RGW respectively between Ogden and Denver; that a substantial volume of live stock that is grazed, pastured and fed in the D&RGW territory is brought in from points on the UP and its connections north and west of Ogden; that the live stock from the D&RGW territory then goes to Denver, Omaha and other eastern markets; that some of the animals are sold for slaughter and others move to the Kansas wheat pastures

and other areas and eventually to Kansas City and other eastern markets; that all this live stock moves and is sold in competition with live stock from points on the UP; that the pasturing of sheep on the wheat pastures of Kansas plays an important part in both the raising of wheat and production of live stock for meat; that live stock men along the D&RGW are at a disadvantage because of the relatively higher rates that they have to pay when moving to the Denver market, the Kansas wheat pastures or other eastern destinations; that freight billing is of value in obtaining a higher price for live stock at both public markets and at country points; that the reduction of the rates would benefit live stock producers by removing the penalty now imposed on traffic moving via the D&RGW; that it would promote greater competition in service between the UP and the D&RGW, stimulate more competition for live stock in the territory north of Ogden and Salt Lake, put live stock men in the D&RGW territory in better competitive position with those along the UP between Ogden and Cheyenne and encourage the movement of live stock, particularly the sheep and lambs into the wheat pastures of Kansas and the lower Mississippi River markets. (Consol. R. I. 310-319.)

Mr. W. H. Hilbert of Denver, Colo., stated that he is head of the Sheep Department of the Producers Life Stock Marketing Association, at Denver; that he had thirty-four years experience in the live stock business; that he is familiar with the Denver and other live stock markets and with the general live stock producing and feeding areas of the country; that freight billing is of value in obtaining a higher price when live stock is sold for shipment to farther points beyond the market or place where it is sold; that the reduction of the higher rates would give live stock producers the benefit of another important route without a rate disadvantage and place them on a parity in the sale

of their livestock as far as freight rates are concerned. (Consol R. I. 453.)

Mr. Elmer J. Wagner of La Mar, Colorado, President of the Arkansas Valley Stock Feeders Association, stated that the 215 members of his Association carry on live stock feeding operations in the Arkansas Valley east of Pueblo, Colo., on lines of the Santa Fe and Missouri Pacific Railroads; that they want to be able to purchase live stock in Idaho, Oregon, Washington and Montana on a competitive basis, with feeders of live stock in other localities, for instance, Northern Colorado and Nebraska; that prior to 1932 members of his Association could buy feeder lambs in large numbers in the territory north of Ogden because the freight rates via Ogden and the D&RGW and beyond to slaughter points on the Missouri River were on a competitive basis; that since 1932 when the competitive rates via the D&RGW were cancelled, the Arkansas Valley feeders have been at a disadvantage because live stock feeders along the UP can overbid them. He stated further that he and the members of his Association like the northwest lambs and would like to buy them if they had the same freight basis; that in 1928 they could compete with the Northern Colorado and Nebraska feeders, but at present their freight rates on lambs from a point like Baker, Oregon, to the Missouri River points via the Ogden gateway and the D&RGW and the Santa Fe is 49 cents higher than the rate that the Northern Colorado and Nebraska feeders have to pay and that with the tax this amounts to over $100 a car and makes it impossible for them to compete; that in 1928 their Association fed over 400,000 lambs in the Arkansas Valley and that at the present time there were only 100,000 lambs in the area. (Consol. R. I. 488-491.)

Mr. Don Clyde of Heber, Utah, stated that he is principally engaged in the production of sheep; that his opera-

tions are spread over 20,000 acres of land and that his operation consists of about 4,000 breeding ewes and about 200 head of cattle; that about 100,000 breeding ewes are handled annually in the area in which he is located; that most of his herd replacements come from points in Idaho and Montana; that a substantial percentage of every sheepman's output are sold as feeders and that these usually go to points in Mid-western States; that the arbitrary additional charge of about 19 cents per 100 lbs. that they have to pay means that the returns to the Utah grower are about that much less than the returns to the grower located on the UP. (Consol. R. I. 324.)

Mr. Charles Redd of La Sal, Utah, testified that in 1949 his company had 27,000 head of sheep and about 2,500 head of cattle; that some of the best sheep in the country, for range purposes, comes from Eastern Oregon and Western Montana and that the best fattening lambs come from Idaho; that he would like to bring in and handle the sheep in the Rio Grande territory on an equal basis of rates with those applicable via the UP. (Consol. R. I. 375-376.)

Mr. Angus McIntosh of Las Animas, Colorado, President of the Colorado Wool Growers Association, which consists of 832 members, stated that prior to 1932 a part of the members of his Association who had operations along the D&RGW bought their herd replacements in the Northwest and enjoyed through rates to Denver and the Missouri River and other eastern points via Ogden; that since 1932 they can no longer compete with the sheep men in Wyoming and in those other States on the UP, because of the lower rates via that line; that when he was able to ship via Ogden and the D&RGW he was able to do so with only two feeds in transit as against three and four feeds enroute via the UP to Denver and the Santa Fe beyond. (Consol. R. I. 494-496.)

Mr. David G. Rice, Jr. of Denver, Colo., Secretary of the Colorado Cattlemen's Association, composed of 5,000 members, stated that live stock feeders in Colorado have to go out of Colorado to an increasing degree to purchase animals for their feeding operations. He also stated in effect that his Association is very much interested in the opening of the Ogden Gateway because its members want to purchase cattle north and west of Ogden, to be shipped to Western Colorado and the Arkansas Valley areas. He agreed with Witness Benton's testimony that the reduction in forest pastures has increased the number of cattle necessary to be brought into Colorado for feeding. (Consol. R. I. 344-356.)

Mr. Herbert B. Heidel, of Pueblo, Colorado, with the Pueblo Division of The American Stores, Inc., Lincoln Packing Company, that operates a slaughterer and cold storage plant at Pueblo, Colo., stated that he received carload shipments of lambs from origins in Idaho and Oregon on the UP; that because of being able to get delivery of the shipments more quickly and because a stop for feed, water and rest enroute between Ogden and Pueblo via the D&RGW, was not necessary, he has been routing such shipments via the D&RGW at Ogden during the past year, notwithstanding that the freight charges average from $70 to $80 per car higher than if routed via the UP to Denver and via connections to Pueblo and beyond. (Consol. R. I. 412-413.)

Mr. Roger S. Smith of Denver, Colo., Supt. of live stock operations of the Holly Sugar Corporation, stated that his company has from 25,000 to 60,000 tons of beet pulp annually for feeding cattle and lambs at Delta, Colo., located southeast of Grand Junction on the D&RGW, and that there are also available several thousand tons of molasses; that he purchases live stock on the UP in Montana, but that he cannot move them to Delta for feeding in

transit at through competitive rates; that live stock produced in the Northwest, particularly in Idaho and Western Montana on the UP, is of excellent grade for use in their feeding operations; that the higher basis of rates through Ogden via the D&RGW hinders their operations and favors those of live stock feeders on the UP in Wyoming and Nebraska. It is the desire of the company, he represents to have all possible routes open and available so that it can go to producing areas where they can get the lowest price. (Consol, R. I. 270-281.)

Mr. L. C. Montgomery of Heber, Utah, is Secretary of the Heber City Cattle Company. His individual operation and those of the company embrace about 5,000 head of cattle; that his operations are substantially similar to those of Mr. Clyde, that Mr. Clyde is engaged in sheep operations while Mr. Montgomery is engaged in cattle operations. Mr. Montgomery also testified as President of the Utah Cattle & Horse Raisers' Association which markets about 75,000 head of beef cattle each year. He expressed the view that opening of the Ogden Gateway would be beneficial to the producers in the State of Utah, and that the burden of the higher freight rates which they are now forced to pay on the movement of live stock from the Northwest via Ogden and D&RGW when moving to eastern markets handicaps the growers and feeders along the Rio Grande. (Consol. R. I. 442-446.)

Mr. Roscoe C. Rich of Burley, Idaho, past President of the Idaho Wool Growers Association, the National Wood Growers Association and the American Wool Council, stated that he has ranches in three locations in Idaho and that he sheared about 8,000 sheep in 1949; that a transit arrangement for Colorado feeding and raising of lambs at competitive through rates would be a benefit to Idaho lamb growers and that he supports the testimony of other

Colorado live stock witnesses who testified in support of the complainant's side of the case. (Consol. R. I. 509.)

The testimony of live stock witnesses was not limited to any particular market or area destinations, and it did specifically include the Denver market and pasture and grazing areas immediately east thereof, to which no relief was granted.

This testimony shows very comprehensively the disadvantages and handicaps suffered by live stock producers under the rate adjustment and reasons why complete relief should be accorded.

It should be particularly noted that partial relief granted by the Commission falls far short of the relief that the live stock producers are entitled to. For instance, live stock producers along the Rio Grande have been denied relief from the exorbitant arbitraries and excessively high combination rates in shipping their live stock to their nearest public market at Denver, and to other markets and destinations in the territory north and east of Denver to which no relief was accorded.

Furthermore, much of the relief the Commission intended to give the live stock industry is defeated by the so-called three-way rule that is applicable generally on the lines of the western railroads. This rule as published in the railroad tariffs provides in substance that on live stock fed or grazed in transit the through rate to be applied shall be the rate:

(a) From original point of shipment to the final destination, or

(b) From original point of shipment to the stop-off point or points, or

(c) From stop-off point or points to the final destination, whichever is highest, in effect on date of initial

shipment from original shipping point, plus the prescribed transit charge.

Illustrating the effect of this rule, the following table shows the rates on cattle and sheep in double-deck cars originating at Blackfoot, Idaho, moving via the Ogden gateway over the Rio Grande and transited at Burlington, Colo., a point on the Rock Island near the Colorado-Kansas State Line, and the rates via the Union Pacific from Blackfoot to Omaha, Kansas City, and St. Louis.

From Blackfoot, Idaho To	Rates in Cents Per 100 Pounds
Burlington, Colo.	133
Omaha, Nebr.	112
Kansas City, Mo.	112
St. Louis, Mo.	130

The rate from Blackfoot to Burlington via the Ogden Gateway and the Rock Island of $1.33 is constructed on combination 43 cents to Ogden as named in Agent Haynes' I. C. C. No. 1514, and 90 cents beyond, Rio Grande I. C. C. No. 951. The rates from Blackfoot to Omaha, Kansas City, and St. Louis are named in Union Pacific I. C. C. No. 5323.

Because the Ogden combination must be observed as minimum rate to Omaha, Kansas City and St. Louis, on a shipment transited at Burlington, the rate would be 21 cents higher than the concurrent rate of $1.12 to Omaha and Kansas City, and by 3 cents higher than the rate to St. Louis, Missouri.

This clearly shows how the denial of relief to the intermediate area (between the Colorado common points and the Missouri River gateways) created an anomalous situation that results in violations of Section 1, Section 3, and Section 4 of the Interstate Commerce Act and should also be remedied upon further consideration by the Commission.

SUBSTANTIVE ISSUES UNDER POINTS III, IV, V AND VI OF THE UNION PACIFIC OPENING BRIEF.

The Union Pacific opening brief under points III, IV, V, and VI (pages 53 to 102) endeavors to deal various phases of substantive issues.

There is considerable overlapping. In the interest of brevity and clarity the live stock associations believe it desirable to summarize these substantive issues under basic questions as follows:

1. Was the Colorado Court correct in holding that the Commission erred, as a matter of law, in failing to hold in the face of uncontradicted evidence that through rates exist over the Rio Grande via the Ogden gateway in connection with the Union Pacific?

2. Was the Colorado Court correct in holding that the Commission erred in limiting its consideration of the case under the restrictive provisions of Section 15(4) of the Interstate Commerce Act, thereby limiting the relief granted to only part of the territory, particularly as far as live stock was concerned, that obviously prejudiced its proper consideration of the entire case?

I.

The Colorado Court Was Correct in Holding That the Commission Erred as a Matter of Law in Failing to Hold in the Face of Uncontradicted Evidence That Through Routes Exist Over the Rio Grande Via the Ogden Gateway in Connection With the Union Pacific.

In its attempt to show that the Colorado Court erred in holding that the Commission was in error as a matter of law in failing to hold in the face of uncontradicted evidence that through routes exist over the Rio Grande via the Ogden gateway in connection with the Union Pacific, the Union Pacific beginning on pages 53 to 82 of its Colo-

rado opening brief makes the general contention that the routes via the Ogden gateway are commercially closed and relies chiefly on the decisions of this Court in *Thompson* v. *United States* 343 U. S. 549, and *Beaman Elevator Co.* v. *Chicago & N. W. Ry.*, 155 I. C. C. 313.

The first and second findings of the Colorado Court refer specifically to the matter of through routes, viz:

> (1) The Commission recognized that the first question for its determination was "whether or not the present routes by way of the Ogden Gateway constitute 'through routes' as that term is used in Sec. 15 (3) and (4) of the Act." *Only five of the ten participating members of the Commission joined in the report and order of the Commission,* wherein it was first determined that through routes were not in existence over the Rio Grande in connection with the Union Pacific through the Ogden Gateway. Having reached this conclusion, the Commission proceeded upon the assumption that any order requiring the establishment of such through routes and joint rates over them must be grounded on findings as specified in Sec. 15(3) and (4). (R. I. 286-287.)
>
> (2) We are of the opinion that the finding of the Commission that there are at present no through routes over the Rio Grande via the Ogden Gateway is not supported by substantial evidence. It is our view that the Commission erred as a matter of law in reaching the conclusion, upon a consideration of undisputed facts, that such through routes are not in existence. This erroneous, self-imposed restriction upon its authority to establish joint rates obviously prejudiced the entire proceeding. (R. 287-288.)

In view of the fact that only five of the ten participating commissioners joined in the report and order of the Commission, it seems appropriate to consider the views indicated by five of the commissioners on the point that through routes exist.

Commissioner Arpaia expressed the opinion that there

are through routes over the Rio Grande and the Union Pacific via the Ogden Gateway on traffic between the territories included in this proceeding, and therefore a finding under the provisions of Section 15(4) of the Interstate Commerce Act is not required. The evidence of record shows that these routes presently are open and available to shippers on combination rates. The history of the relationship between these carriers leaves no doubt as to that fact.

In his concurring opinion, Commissioner Lee made a very realistic and forthright comment wherein he stated, that the decision in this case will correct in part, a long standing unlawful rate adjustment, but expressed the opinion that the action of the Commission should not be limited to partial correction of this unlawful rate adjustment, that on the facts shown in the record the act requires that the rates on all commodities between the points in excluded territory and Colorado common points and the points east thereof, over the Rio Grande routes shall be no higher than those over the Union Pacific routes, that the act contemplates that there shall be no excluded territory with respect to any commodity or persons, that numerous shippers testified that these routes are open and available and that they can route traffic over them, and further, that this testimony was not challenged or contradicted, but that on the contrary a responsible traffic official of the U. P. testified that the Rio Grande routes are "actually available today on traffic to and from points on the U. P. and its connections in Utah, north of Ogden, Idaho, Montana, Oregon and Washington."

Commissioner Mahaffie, in his profound dissenting opinion, that was concurred in by Commissioners Splawn and Cross, stated that a finding that the routes are open and fully available to shippers today is fully supported by the evidence, that all of this evidence clearly supports

a finding that the routes are existing established through routes over which through rates apply and that the railroads participating therein consent to their use as through routes and freely hold themselves out to shippers as ready and willing to perform transportation service over them. They meet completely the requirements necessary as prerequisites for a finding that they are established through routes announced by this Court in *Thompson* v. *United States*, 343 U. S. 549, where it stated "the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service." However, as stated by the court, there was no evidence that any through transportation had ever been offered from and to the points involved in the suit and, therefore, no through routes existed between those points.

Commissioner Mahaffie stated further that the situation here is in striking contrast to that in the *Thompson* case. Here there is substantial evidence of a holding out that through transportation will be furnished and of execution of such offers by the issuance of through bills of lading and the performance of through service over many years. We cannot ignore the fact that the joint rates over these routes that were in effect from 1897 to 1906 and 1912 were canceled by the Union Pacific without canceling its participation in the same through routes thereafter at higher through combination rates. That railroad's course of conduct evidenced no more than a desire to discontinue joint rates so as to make the higher combinations applicable. Its action in canceling its participation in joint rates did not, without more, cancel its participation as a carrier in the through routes. The latter were never disestablished but continued to exist. The record taken as a whole in-

evitably leads to that conclusion. *To find under such a state of facts that no through routes exist for commodities generally is directly contrary to the evidence.* (Italics supplied.)

The finding of the majority (of the Commission) that there are at present no through routes, as that term is used in the Act, over the Rio Grande via Ogden or Salt Lake on traffic under consideration, except on eastbound shipments of sheep or goats, is definitely in error. As a matter of fact, the evidence is clear and uncontradicted that as to live stock and various other commodities that the Rio Grande route is open. However, any shipper using it is put to the pains of paying a rate penalty that we believe the statute gives the Commission power to remove as to all territory, without regional restriction.

The holding of the majority is not only contrary to the uncontradicted facts in the case, that the Rio Grande route is open, but it is also contrary to law.

In the case before the Court in the *Thompson* case, there was no evidence that the Missouri Pacific ever offered through transportation over the route in question, nor was there any evidence as to any shipments having been made. The Commission's order was wholly without evidentiary support under the accepted tests for determining the existence of a through route in accordance with the doctrine laid down by this Court in that case.

In the *Beaman* case there was evidence of only one shipment that subsequently was admitted to have been made in error.

In the case before the Court the route is open and has been open for many years. There is evidence that the route has been used, but its use is subjected to penalty of paying excessive rates and charges. The evidence in this case clearly meets all the essential requirements of the existence of a through route.

The uncontradicted evidence of through route shipments warrants the holding of the Colorado Court that through routes exist to and from points on the Union Pacific in the northwest over the Rio Grande via the Ogden gateway to and from Colorado common points, the Missouri River gateways, and beyond. The Union Pacific also contends that the Ogden gateway route is closed. The decision of this Court in the *Virginian Railway* U. S. 272, U. S. 678 (also referred to in the decision of the *Thompson* case) is in point here. In that case, it was stated that the route in question was commercially closed because the carriers had not established any joint rates and that only a combination of local rates was applicable that resulted in charges so high as to be prohibitive. The Commission there found that the combination rate was both unreasonable and discriminatory and prescribed through rates which it found was reasonable and non-discriminatory. The order was made under Section 1 and Section 3, and we contend that relief under these same sections of the Act is justified in this case without any territorial limitations.

II.

The Colorado Court Correctly Held That the Commission Erred in Limiting Its Consideration of the Case Under the Restrictive Provisions of Section 15(4) of the Act Prejudiced Its Proper Consideration of the Entire Case.

The Union Pacific beginning at page 87 of its Colorado opening brief contends that even if the Commission erred in its failure to find that through rates exist over the lines of the Rio Grande via the Ogden gateway, and even if this was an error of law it manifestly did not serve as a "restriction" or a deterrent in giving the Rio Grande relief.

If the Commission's failure to find that through routes exist, did not serve as a "restriction" or deterrent, then why was the relief granted in certain areas and denied in other areas as indicated in the fore part of this brief.

This is conclusively shown by Commissioner Lee's concurring statement in which he said:

> "The decision in this case will correct in part, a long standing unlawful rate adjustment, but expressed the opinion that the action of the Commission should not be limited to a partial correction of this unlawful rate adjustment, that on the facts shown in the record the act requires that the rates on all commodities between the points in excluded territory and Colorado common points and the points east thereof, over the Rio Grande routes shall be no higher than those over the Union Pacific routes, that the act contemplates that there shall be no excluded territory with respect to any commodity or persons, * * * ".

Furthermore on page 88 of the Union Pacific brief there appears a statement concerning the proposed report by the Chief Examiner as follows:

> "The chief examiner in his proposed report also found, as did the Commission, that the through routes claimed by the Rio Grande were not in existence, but nevertheless proceeded to recommend that the Commission order through routes and joint rates on all commodities, because he thought the evidence proved necessity for them in the public interest. Thus, the short-haul limitation in Section 15(4) operated as no restriction whatever upon the chief examiner, nor upon the Commission to the extent that it thought the evidence proved that joint rates were necessary in the public interest."

This is definitely incorrect and conveys a completely erroneous impression of the true nature of the proposed report by Mr. Frank Mullen, Chief Examiner, who conducted all the hearings for the presentation of evidence and testimony in the proceedings before the Commission.

Nowhere throughout the thirty-two mimeographed sheets of the very comprehensive proposed report is there any statement to the effect that the Examiner either found "that through routes were not in existence" or made any recommendation that the Commission so find.

On the contrary, the existence of the routes is specifically recognized in the 1st of 7 recommended findings, viz:

> "1. That the routes via Salt Lake City or Ogden in connection with the Rio Grande over which joint rates are sought in this proceeding are not unreasonably long or unduly circuitous."

The second recommended finding relates to the establishment of "joint rates" over such routes:

> "2. That the failure and refusal of the Union Pacific and the other defendants, to the extent they participate in the traffic, to join with the Rio Grande in joint rates over such routes from and to the Northwest territory, described herein, via Salt Lake City or Ogden in connection with the Rio Grande to and from Utah common points and to and from Colorado common points and points east thereof, result in undue disadvantage and undue prejudice to shippers and receivers of freight and to the localities and districts in Utah and Colorado served by the Rio Grande."

Since the question of whether or not through routes exist is the most vital issue in this proceeding we believe it appropriate to quote at least two more of the recommended findings, viz:

> "4. That it is necessary and desirable in the public interest that such joint rates over through routes over the Union Pacific and its connecting railroads, defendants herein, via Salt Lake City or Ogden in connection with the Rio Grande from and to points in Utah north of Ogden, Idaho, Montana, Oregon and Washington to and from Utah common points and to and from Colorado common points and points east thereof should be established and maintained." and

"6. That such joint rates over said routes are needed to provide adequate and more efficient and more economic transportation to the shippers and receivers of freight and localities and districts in the Northwest in order that they may ship over those routes at the joint rates, livestock, agricultural commodities, lumber and lumber products, and other commodities, to points on the Rio Grande under marketing and transit arrangements with right to reship beyond to Colorado common points and points east thereof."

It should be observed that the majority decision of the Commission did not follow the "existing route," concept indicated so clearly by the Chief Examiner in his proposed report, but adopted the "closed route" concept that inevitably brought the restrictive provisions of Section 15(4) into play with the result that the relief granted was accordingly restricted.

CONCLUSION

For the reasons stated the Colorado Court was correct in holding that the Commission erred as a matter of law in failing to hold in the face of uncontradicted evidence that through routes exist over the Rio Grande via the Ogden gateway in connection with the Union Pacific, and

Furthermore the Colorado Court correctly held that the Commission erred in limiting its consideration of the case under the restrictive provisions of Section 15(4) of the I. C. Act prejudiced its proper consideration of the entire case.

Wherefore the decree and judgment of the United States District Court of Colorado should be affirmed and the cause remanded to the Interstate Commerce Commission for proceedings in conformity with the opinion of that Court.

Respectfully submitted,

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April 12, 1956.

PROOF OF SERVICE.

I, Lee J. Quasey, Counsel of record for intervening appellees herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 13th day of April, 1956, I served, on behalf of the intervening appellees herein named copies of the foregoing reply brief to the opening briefs of appellants in Nos. 332, 333 and 334, including the several parties, shown below, by mailing a copy in a duly addressed envelope with air mail postage prepaid as follows:

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